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Ord, *The IRS's Right of Access to the CPA's Workpapers and Client Records*, The Tax Advisor 516 (September 1973) 30

Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962) 40

Schuster and Lehner, *Why Swiss Bank Secrecy*, 156 The Bankers Magazine 32 (Autumn, 1973) 35

Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum. L. Rev. 681 (1965) 27

American Banker, February 13, 1973 28

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MISCELLANEOUS Pages

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Annual Report of the Secretary of the Treasury on the State of the Finances, (1972) 29

Federal Bureau of Investigation, Uniform Crime Reports for the United States, (1972) 22

Federal Deposit Insurance Corporation, Summary of Accounts and Deposits In All Commercial Banks—June 30, 1972 (National Summary) (1972) 21, 28

Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. (1970) 5, 21, 29

Hearings on H.R. 15037 Before the House Committee on Banking and Currency, 91st Cong., 1st and 2nd Sess. (1970) 4, 19

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In the

Supreme Court of the United States

October Term, 1973

No. 72-985

California Bankers Association,

Appellant,

vs.

George P. Shultz, Secretary of the Treasury, et al.,

Appellees.

No. 72-1073

George P. Shultz, Secretary of the Treasury, et al.,

Appellants,

vs.

California Bankers Association,
Fortney H. Stark, Jr., et al.,

Appellees.

No. 72-1196

Fortney H. Stark, Jr., et al.,

Appellants,

vs.

George P. Shultz, Secretary of the Treasury, et al.,

Appellees.

On Appeals from the United States District Court
for the Northern District of California

BRIEF FOR THE APPELLANT

California Bankers Association

INTRODUCTION

In October, 1970, Congress enacted legislation that has come to be known as the Bank Secrecy Act.[1]

The Act has two parts. Title I and its implementing regulations require banks and other financial institutions to copy and retain virtually every piece of paper that passes through the American banking system. Titles II and III require banks among others to report certain domestic and foreign currency transactions.

These cases came to court in June, 1972, with suits by the California Bankers Association (CBA), a number of individuals, a bank, and the American Civil Liberties Union, attacking both the Act's recordkeeping and reporting requirements.

In the fall of 1972, a three-judge court filed a memorandum decision and entered an order (1) denying motions to enjoin the Act's recordkeeping provisions, but (2) granting motions to enjoin the domestic reporting requirements. Both the private litigants and the government have appealed.

This appeal by the California Bankers Association challenges the Bank Secrecy Act's mandatory recordkeeping requirements.

OPINION BELOW

The opinion of the District Court is included in the Single Appendix ("App.") at 75-93, and is reported at *Stark v. Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972).

JURISDICTION

These appeals comprise two consolidated cases seeking to enjoin the recordkeeping and reporting requirements of the Bank Secrecy Act as unconstitutional.

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1. Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114, *et. seq.*, (12 U.S.C. §§ 1829b, 1951-1959, and 31 U.S.C. §§ 1051-1122).

On October 18, 1972, a three-judge court convened pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 968 (28 U.S.C. § 2282), denied motions to enjoin enforcement of the Act's recordkeeping provisions, but granted an injunction enjoining enforcement of the domestic reporting requirements. (App. 94-95).

The government filed a notice of appeal to this Court in both cases on November 13, 1972. (App. 96-99). The CBA and the various plaintiffs in the *Stark* case noticed appeals to this Court on November 16 and 17, 1972, respectively. (App. 100-103).

The California Bankers Association invokes this Court's jurisdiction under Act of June 25, 1948, ch. 646, 62 Stat. 968 28 U.S.C. § 1253. See generally, *Goldstein v. Cox*, 396 U.S. 471 (1970).

QUESTIONS PRESENTED

(1) Do the mandatory recordkeeping requirements of the Bank Secrecy Act bear a reasonable relationship to the Act's objectives as required by the due process clause of the Fifth Amendment?

(2) Does the Bank Secrecy Act violate the limitations this Court has imposed on mandatory recordkeeping by reason of the Fifth Amendment due process clause?

(3) Do the recordkeeping requirements of the Bank Secrecy Act undermine the Fourth and Fifth Amendment limitations this Court has imposed on the government's summons and subpoena power?

(4) Do the recordkeeping requirements of the Bank Secrecy Act invade the privacy inherent in bank-customer relations in violation of the First Amendment?

(5) Are the recordkeeping provisions of the Bank Secrecy Act so inexorably tied to the Act's reporting requirements as to render both unconstitutional for the same reasons?

(6) Does the California Bankers Association have standing to assert the constitutional rights of its members and their customers in this litigation?

STATUTES INVOLVED

Pertinent provisions of the United States Constitution are set forth in *Appendix A* to this brief. The Bank Secrecy Act is set forth in *Appendix B*. The Act's implementing regulations, including amendments, are set forth in *Appendix C*.

STATEMENT

Background—Legislation leading to enactment of the Bank Secrecy Act was first proposed in the spring of 1970 with the introduction of H.R. 15073 in the House of Representatives. Rep. Wright Patman, Chairman of the House Banking and Currency Committee, described the Act as a means of combatting the use of "secret foreign bank accounts and foreign financial institutions as part of illegal schemes by American Citizens and others . . ."[2]

In April, 1970, Senators Proxmire, Brooke, and Williams introduced S. 3678 in the Senate. The latter was similar to H.R. 15073, but contained additional provisions affecting securities transactions with foreign interests.

Hearings on H.R. 15073 and S. 3678 were held in June, 1970. The legislation was actively supported by the Departments of Justice and Defense and by the Securities and Exchange Commission among others. For example, Assistant Attorney General, Will Wilson, speaking for the Department of Justice said:

> "We are deeply concerned when foreign secrecy laws prevent foreign bankers from introducing foreign

2. *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st and 2d Sess., 8 (1970).

bank documents into evidence. We are equally concerned when domestic banks and other domestic financial institutions fail to retain records highly useful to enforcement of the criminal laws—federal, state and local."[3]

In October, 1970, the Bank Secrecy Act, combining and modifying H.R. 15073 and S. 3678, was enacted by the Congress and signed into law by the President. The Treasury Secretary promulgated implementing regulations on March 31, 1972.[4]

The Statutes and Regulations—The Bank Secrecy Act has two parts. Title I has been used to compel banks and other financial institutions to microfilm or otherwise copy virtually every piece of paper that passes through the American banking system. (Sections 101, 102). Title II requires banks and other financial institutions to report certain domestic and foreign currency transactions. (Sections 221, 224).

The Act's reporting requirements are the subject of the government's appeal.[5] This appeal and the appeal in the *Stark* case[6] challenge Title I—the Act's recordkeeping requirements.

Title I provides in part that its purpose is "to require the maintenance of appropriate types of records . . . where such records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101, 121). The Act authorizes regulations compelling banks and

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3. *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess., 58 (1970).

4. See 31 C.F.R. §§ 103.11-103.51, included with this brief as *Appendix C*.

5. See *Shultz v. California Bankers Association*, No. 72-1073.

6. See *Stark v. Shultz*, No. 72-1196.

other financial institutions to (1) identify each person having an account; (2) identify each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any account; (3) identify every person not already identified, for whose account a check, draft, or similar instrument has been received for deposit or collection; and (4) microfilm or otherwise reproduce *all* checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection. (Section 101). Section 123 imposes similar requirements on uninsured financial institutions, such as those in the business of issuing money orders or travellers checks.

Title I further provides that in addition to the records described above, "each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of" the Act, that is, the maintenance of records that have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101, 102).

Finally, Title I provides that all records or evidence required by the Act "shall be retained for such period as the Secretary may prescribe," not to exceed six years, "unless the Secretary determines, having regard for the purposes of [the recordkeeping requirements], that a longer period is necessary . . . ." (Section 101).

In March, 1972, the Secretary of the Treasury promulgated implementing regulations requiring banks, and others, to:

> (1) Secure and maintain a taxpayer identification number for each person or legal entity maintaining an account;
>
> (2) Secure and maintain the social security number of an individual having a financial interest in an account where one or more individuals maintain an account;

(3) Microfilm or copy each document granting signature authority for each deposit or share account;

(4) Microfilm or copy each statement, ledger card, "or other record" showing each transaction with respect to the account;

(5) Microfilm or copy each check, clean draft, or a money order drawn on the bank or issued by it, with exceptions under certain circumstances for accounts averaging at least 100 checks per month and which fall into certain specifically enumerated categories, such as dividend, payroll, employee and medical benefit checks;

(6) Microfilm or copy each item other than bank or periodic charges made pursuant to agreement with the customer comprising a debit to the account which is not otherwise specifically required to be kept and which is not specifically exempted; and

(7) Microfilm or copy records prepared or received by a bank in the ordinary course of business which would be needed to reconstruct a checking account and trace a check deposited in the account through its domestic processing system or supply a description of the deposited check.[7]

Following the decision by the court below, the foregoing regulation was amended to exclude checks for $100 or less. (38 Fed. Reg. 2174 (1973)) The amendment has no effect on this appeal.

The regulations implementing the Act's recordkeeping provisions also require banks and other financial institutions to maintain extensive records of certain extensions of credit, and transfers of currency, other monetary instruments, checks, investment securities, or credit of more than $10,000, to persons, accounts or places outside the United States. (31 C.F.R. § 103.33).

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7. 31 C.F.R. § 103.34

Finally, banks are required to retain the records necessary to reconstruct a checking account for two years. All of the other required records are to be retained for five years. (31 C.F.R. § 103.36).

Failure to comply with the Act and implementing regulations subjects banks, other financial institutions, and their respective officers, to cumulative civil and criminal penalties. (Sections 125, 126, 127). The Treasury Secretary is also empowered to seek broad injunctive relief. (Section 124).

The Litigation—This litigation began on June 7, 1972, with a suit by a number of individuals, a bank, and the American Civil Liberties Union of Northern California. (*Stark v. Shultz,* No. 72-1196). Two weeks later, the plaintiffs in the *Stark* case were joined in their attack on the Bank Secrecy Act by the California Bankers Association. (*California Bankers Association v. Shultz,* No. 72-985)

The plaintiffs in the *Stark* case are Fortney H. Stark, Jr., a bank president and customer; Security National Bank, an insured national bank; Charles C. Marson, a bank customer; the American Civil Liberties Union of Northern California, a non-profit membership corporation; Fred Lieberman, an individual expecting to export monetary instruments; Edward C. Harwood, Carl Bruer and Edward Durell, individuals maintaining financial interests in and signature authority over one or more bank accounts in foreign countries; and sixteen unidentified additional plaintiffs. The plaintiff in the *California Bankers Association* case is an association comprising all 158 state and national banks doing business in California.

The District Court ordered the two cases consolidated; issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other

financial institutions and persons" (App. 42); and pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 968 (28 U.S.C. § 2282), convened a three-judge court to hear and decide the constitutional issues raised by the complaints and motions for a preliminary injunction.

The District Court Opinion—In a memorandum decision dated September 11, 1972, the District Court upheld the Bank Secrecy Act's recordkeeping and foreign transaction reporting requirements. (App. 75-79). But the District Court found the Act's domestic reporting requirements unconstitutional and, with one judge dissenting, issued a preliminary injunction. (App. 79-93, 94-95).

The District Court did not discuss plaintiffs' objections to the Act's recordkeeping requirements. The decision simply states that the court found "no constitutional violation in these record-keeping provisions, as such." (App. 76-77).

Turning to the Act's reporting requirements, the District Court upheld, first, the provisions compelling reports of exports and imports of monetary instruments. (App. 77-79). The court noted, *inter alia,* that in the case of foreign transactions, the Act contains adequate procedural safeguards:

> "For example, with respect to enforcement of [Section 231] of the Act [Section 235] provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of [Section 241] (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law." (App. 79).

There are, however, no such safeguards in the case of the Act's domestic reporting provisions. The question, then,

in the opinion of the District Court, was whether the broad, unlimited authority of the Treasury Secretary to compel reports on financial transactions from banks, other financial institutions, and their customers without judicial intervention of any kind, "is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment." (App. 81).

The District Court noted, first, this Court's recognition of the right of privacy, and cited among other cases, *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Katz v. United States,* 389 U.S. 347 (1967). (App. 82). The District Court noted also that:

> ". . . communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963)." (App. 84).

In the case of The Bank Secrecy Act, however, the District Court observed that there was no opportunity for judicial supervision or intervention. (App. 85). The Act and its implementing regulations automatically compel reports of certain domestic currency transactions whenever

they occur—or the reporting entity decides they have occurred.[8]

> "The Act challenged . . . makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand." (App. 86-87).

The District Court opinion describes the relationship between the Act's domestic reporting requirements and the crimes sought to be uncovered as "far fetched." (App. 90), and concludes that the Act

> ". . . insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by the Bill of Rights, particularly the Fourth Amendment provision protecting 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.'" (App. 91).

---

8. Determining when a proscribed transaction has occurred is no mean task. Section 103.22 of the regulations is singularly vague. Yet violations of its provisions carry criminal penalties. See 31 C.F.R. § 103.49, and see Section 209 of the Act. The implications of this dilemma will be discussed in our reply to the government's appeal.

The Appeals—The government filed a notice of appeal to this Court on November 13, 1972, seeking review of that portion of the District Court order enjoining the operation and enforcement of the Bank Secrecy Act's domestic reporting requirements. (App. 96-99). On November 16 and 17, 1972, respectively, the California Bankers Association, and the various plaintiffs in the *Stark* case filed notices of appeal from the District Court's refusal to enjoin the operation and enforcement of the Act's recordkeeping provisions. (App. 100-103).

This Court noted probable jurisdiction on October 9, 1973, and the appeals were consolidated for hearing (App. 104).

SUMMARY OF ARGUMENT

(1) The announced purpose of the Bank Secrecy Act is the recording and retention of bank records having "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." The Act and implementing regulations, in alleged pursuit of that purpose, require banks to monitor *every* bank account in the United States, and to copy and retain virtually every piece of paper that passes through the American banking system. As a result, and since the checks one writes reveal the intimate details of a citizen's financial, social and political life, banks are being forced to compile an exhaustive profile on virtually every adult member of the American community.

(2) There is almost no relationship between the Bank Secrecy Act's basic purpose—the detection, apprehension and conviction of criminals—and the requirement that virtually every piece of paper passing through all 200 million American bank accounts be copied and retained. Even if one were to assume that every crime committed in the United States would somehow be revealed by the perpetrator's bank account—including those such as homicide

and forcible rape that have little or nothing to do with banks and banking—*less than 4.4%* of the bank accounts in the United States would be involved. Quite apart, then, from all other objections, the wholesale surveillance of every bank account in the United States is a witless enterprise.

(3) The indiscriminate, mass surveillance of every bank account in the United States is unnecessary and inappropriate. There are any number of alternate, reasonable means available. As such, the Bank Secrecy Act violates due process. See, e.g., *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935) and *N.A.A.C.P. v. Alabama*, 337 U.S. 288 (1964).

(4) The Act violates the Fifth Amendment right of due process by imposing two separate and unreasonable requirements on the American banking industry.

First, the Bank Secrecy Act plainly violates the limitations this Court has imposed on compulsory recordkeeping. There is virtually no relationship between the objectives of the Act and the mass surveillance of every bank account in the United States. The records required have no specific purpose. They have *nothing* to do with the regulation of banks and the banking business. They destroy the Fifth Amendment limitations this Court has imposed on the use of required records against the recordkeeper. See, *Shapiro v. United States*, 335 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968).

Second, the Act violates economic due process by requiring banks to spend approximately $6.1 million each year to make and retain records they do not need or want—$6.1 million a year to spy on their customers.

(5) In *United States v. Powell*, 379 U.S. 48 (1964), *Donaldson v. United States*, 400 U.S. 517 (1970) and *Couch v. United States*, 409 U.S. 322 (1973), this Court set forth

various safeguards against the unlawful use of the government's summons and subpoena power against third-parties. By requiring banks, among others, to record and retain writingss that would otherwise belong to the maker (e.g., checks deposit slips, etc.) the recordkeeping required by the Bank Secrecy Act transfers title and possession to the banks. This destroys the practical and legal ability of a citizen under investigation to assert the Fourth and Fifth Amendment rights outlined in *Powell, Donaldson* and *Couch.*

(6) The privacy and anonymity protected by the First Amendment includes the confidentiality inherent in bank-customer relations. By allowing the Treasury Secretary unlimited discretion to include or exclude banks and bank accounts from its recordkeeping requirements, the Bank Secrecy Act violates the rule that intrusions on First Amendment rights be narrowly drawn, reasonable and definite. See, e.g., *Niemotko v. State of Maryland,* 340 U.S. 268 (1951).

(7) The wording of the Bank Secrecy Act and the government's arguments to this Court confirm that the recordkeeping provisions are the handmaiden of the Act's automatic reporting requirements. Since the reporting requirements plainly violate the First, Fourth and Fifth Amendments, the Act's recordkeeping provisions are unconstitutional for the same reasons.

(8) Finally, since its members are being injured, the California Bankers Association has standing to assert their constitutional rights. (*Sierra Club v. Morton,* 405 U.S. 727 (1972)). In addition, the CBA has standing to assert the constitutional rights of its members' customers. Those rights are fundamental and the banks appear to be the only parties affected by the Act's recordkeeping requirements in a position to assert this constitutional challenge. See, *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

ARGUMENT

Introduction

We have described the Bank Secrecy Act as requiring banks and other financial institutions to microfilm or otherwise copy virtually every piece of paper that passes through the American banking system. To appreciate the impact and effect of that fact, we respectfully call attention, first, to the recordkeeping requirements of the Act and the Treasury Secretary's implementing regulations.

Section 101(b) (relating to insured banks) and Section 123(a) (other financial institutions) provide that where the Secretary "determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations . . ." The Act then requires banks and other financial institutions to maintain "records and other evidence" of the "identity of each person having an account . . . and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account." (Sections 101(c) and 123(a)(1)).

The Act further requires banks, among others, "to the extent that the regulations of the Secretary so require" to microfilm or otherwise copy "each check, draft, or similar instrument drawn on it and presented to it for payment;" and to keep "a record of each check, draft or similar instrument received by it for deposit or collection . . ." (Sections 101(d) (1) and (2)).

> "(f) In addition to or in lieu of the records and evidence otherwise referred to [above], each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section." (Section 101(f)).

Finally, the Act authorizes regulations compelling retention for up to six years, "unless the Secretary determines having regard for the purposes of this section, that a longer period is necessary . . ." (Section 101(g)).

The Treasury Secretary has seized on the foregoing provisions with a vengeance.

Section 103.34 of the Bank Secrecy Act regulations requires banks to

> ". . . secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.
>
> (b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:
>
> (1) Each document granting signature authority over each deposit or share account;
>
> (2) Each statement, ledger card, or other record on each deposit or share account, showing each transaction in, or with respect to, that account;
>
> (3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;
>
> (4) Each item other than bank charges or periodic charges made pursuant to agreement with the cus-

tomer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits." (31 C.F.R. § 103.34).

After this litigation began and the decision of the court below was known, the Secretary amended the foregoing

section.[9] The amendment eliminates the requirement that banks keep microfilm copies of checks "drawn for $100 or less." (31 C.F.R. 103.34(b)(3)(1973)). With all due respect, the $100 exemption is meaningless. A microfilm camera cannot discriminate between checks in different amounts, and there is no practical way for a bank to segregate checks by dollar amounts for copying purposes. Banks are still having to copy every check presented for payment. The 1973 amendment of Section 103.34 does not obviate our objections to the Act and its implementing regulations.

Finally, Sections 103.33 and 103.35 of the regulations impose similar but somewhat narrower requirements on brokers and dealers in securities and other financial institutions. (31 C.F.R. §§ 103.33, 103.35).

1. The Recordkeeping Requirements of The Bank Secrecy Act Subject the American Public to Massive, Indiscriminate Surveillance.

As a result of the Bank Secrecy Act's recordkeeping requirements, banks among others are being forced to compile an exhaustive diary of their customers' financial lives.

The Bank of America—America's largest bank[10]—processes approximately 5,538,000 checks *each day.* (App. 49).

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9. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). In addition to amending Section 103.34, the 1973 amendments provide that information obtained by reason of the Act shall be received by other departments or agencies "in confidence," and etc., (31 C.F.R. § 103.43 (1973)), and "states specifically" (38 Fed. Reg. 2174 (1973)) that "inspection, review or access" to required records "is governed by other applicable law." (31 C.F.R. § 103.51 (1973)). The 1973 amendments also eliminate credit card systems from the operation of the Act (31 C.F.R. § 103.11 (1973)); and delete the phrase "or otherwise modify" from the regulation giving the Secretary authority, "in his sole discretion", to "make exceptions to or grant exemptions from the requirements of" the Act. (31 C.F.R. § 103.45 (1973)).

10. Moody's Bank and Finance Manual 555 (1973).

It is generally accepted that the Bank of America does approximately 40% of the banking business in the State of California. (App. 50). It follows, then, that everyday in California alone, banks must copy and retain the fronts and backs of approximately 13,000,000 checks.

The nationwide effect of the Act's recordkeeping requirements is even more awesome.

> "It is estimated that in 1970 the American banking system will handle over 20 billion checks and that, on the average, each check will be handled by two and a half banks. The requirement, therefore, that every check drawn on a bank be photocopied would mean the production of 20 billion photocopies each year. The recordkeeping requirements that the Secretary may impose could require an additional 30 billion photocopies each year. Looked at another way, this would mean microfilming more than 166 million pounds of little pieces of paper." *Hearings on H.R. 15073 Before the House Committee on Banking and Currency,* 91st Cong., 1st and 2nd Sess., 320 (1970).

More important for our purposes, however, is the fact that these checks provide a social, financial and political profile on virtually every adult member of the American community. A checking account records the identity of the customer's doctors, lawyers, retail and personal creditors, political and social affiliations, educational and avocational interests, vacation plans, mortgage lender, periodical subscriptions, tax payments, haberdasher and shoemaker. A man is defined by the checks he writes.[11]

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11. "When the Federal Bureau of Investigation first looked into [the Pentagon Papers] case . . . the bureau managed to get Dr. Ellsberg's bank records, including the records of his cancelled checks. From them, the bureau learned the names of all of Dr. Ellsberg's physicians and his two dentists and each of them was interviewed by FBI agents, as were many of his friends and relatives." N.Y. Times, April 30, 1973, at 21, col. 2.

There is no rational difference between the recordkeeping requirements of the Bank Secrecy Act and legislation requiring American telephone companies to record and retain all the telephone calls made by all their various subscribers. Such legislation would surely violate the Fourth Amendment right to freedom from "broad and unsuspected governmental incursions into conversational privacy." *United States v. United States District Court,* 407 U.S. 297, 313, (1972). A checking account records a citizen's activities, opinion, and beliefs as fully as the transcripts of his telelphone conversations.[12]

Similarly, there would appear to be no real difference between an Act compelling the banking industry to monitor the financial affairs of its customers and a law requiring retail stores to record their patrons' purchases. Those purchases, after all, could be said to have a "high degree of usefulness in criminal, tax or regulatory investigations or proceedings."

In summary, a citizen's bank records are more than an account of his income and expenditures. They describe the man—his knowledge, opinions and interests—in much the same manner as recordings of his telephone conversations.

2. There Is Virtually No Relationship Between the Bank Secrecy Act's Objectives and Its Recordkeeping Requirements.

The District Court has described the relationship between the Bank Secrecy Act's domestic reporting re-

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12. The government has attempted to distinguish the Bank Secrecy Act from a law compelling telephone companies to record their subscribers' conversations.

> "The telephone company is not a party to a telephone conversation and the disclosure of the conversation to the telephone company and its employees is not necessary in order to facilitate the transmission of the communication." *Motion to Affirm,* filed by the government in Nos. 72-985 and 72-1196, page 13.

In fact, of course, a bank's check and data processing equipment is no more and no less "a party" to a transaction than a telephone company's communications equipment. Their role is the same.

quirements (Title II) and the expectation they may uncover wrongdoing as "far fetched." (App. 90). The foregoing observation applies with equal accuracy to the relationship between the Act's compulsory recordkeeping requirements and the Act's announced purpose, namely, the copying and retention of financial records having "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101 and 121).

To appreciate just how tenuous that relationship is, we respectfully call attention, first, to Sections 101(a)(2) and 123 of the Act, authorizing maintenance and retention of records found by the Secretary to have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." By requiring banks to monitor *every* bank account and to copy and retain virtually every piece of paper that passes through America's domestic banking system, the Secretary has "determine[d]" (31 C.F.R. § 103.31) that *all* the bank records of *every* citizen "have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." That, of course, is nonsense—unless one assumes every citizen is a crook.

Even more unreasonable is the assumed relationship between the mass of material required by the Act and its basic purpose—the apprehension and conviction of criminals.[13]

Statistics are in order.

First, the data available indicates that as of June 30, 1972, there were 200,700,515 bank accounts in the United States.[14]

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13. See, *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess., 1-2 (1970).

14. Federal Deposit Insurance Corporation, Summary of Accounts and Deposits In All Commercial Banks—June 30, 1972 (National Summary), 18 (1972).

Second, and to use an example of a crime deemed rampant, the Federal Bureau of Investigation estimates that in 1972, there were 527,400 arrests for violation of State and Federal drug abuse laws.[15]

It follows, then, that even if we assumed that *all* narcotics law violations would, in some way, be indicated by the offenders' bank records *less than .03%* of the bank accounts in the United States would disclose evidence of drug abuse, and then only *some* of the records in those accounts would be useful. Even if one *triples* the number of estimated arrests for narcotics law violations, on the assumption the Bank Secrecy Act would reveal otherwise undetected crimes, less than .09% of the 200,700,515 bank accounts in the United States would be involved.

Consider, next, that there were an estimated 78,600 arrests for illegal gambling in the United States in 1972.[16] Illegal gambling, more so than most crimes, presumably involves the use of banks and bank accounts. Yet here again, even if we multiply the number of arrests by a factor of ten (10), again on the assumption the Act would result in increased detection, *less than .04%* of the bank accounts in the United States would be involved.

Finally, even if we take the total number of estimated arrests in 1972 for *all* crimes in the United States (8,712,400),[17] including those such as homicide, arson and forcible rape that have little or nothing to do with banks and bank accounts, the records relating to *less than 4.4%* of the 200 million American bank accounts would be useful.

There is, then, a gross disparity between the objectives of the Act and its recordkeeping requirements. Quite apart

15. Federal Bureau of Investigation, Uniform Crime Reports for the United States, 119 (1972).

16. *Id.*

17. *Id.*

from all other objections, the wholesale surveillance of every bank account in the United States is a witless enterprise.

3. Since There Is No Rational Relationship Between the Objectives of the Act and the Recordkeeping It Requires, the Bank Secrecy Act Violates Due Process.

The discrepancy between means and ends inherent in the wholesale surveillance of every bank account in the United States would appear to be in clear violation of the due process principles announced in such cases as *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935) and *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964).

In *Helvering*, the constitutionality of an Internal Revenue Service regulation requiring inclusion of the value of a revocable trust in the estate of the decedent trustor was in question. *Id.* at 86. The taxpayer argued, *inter alia*, that inclusion would be arbitrary and deprive the taxpayer of property without due process. *Id.* at 89. The Court rejected that contention and said:

> "The test of validity in respect of due process of law is whether the means adopted are appropriate to the end . . . if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights . . . the guarantee of due process is infringed." *Id.* at 90.

The Court reasoned that inclusion of the revocable trust corpus in the taxable estate was essential to prevent tax evasion. *Id.* at 91. The Court concluded, however, that there are "limits to the power of Congress to create a fictitious status under the guise of supposed necessity," and cited two examples of tax regulations that were "so grossly unreasonable as to violate the due process clause of the Fifth Amendment." *Id.* at 92. See also, *Heiner v. Donnan*, 285 U.S. 312

(1932) and *Hooper v. Tax Commissioner of Wisconsin*, 284 U.S. 206 (1931).

Here, the gross disparity between the objectives of the Bank Secrecy Act and the means employed are clear. Every bank account in the United States simply does *not* have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings."

In *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964) this Court found Alabama's attempts to prohibit the N.A.A.C.P. from doing business in that State a violation of due process. Writing for a unanimous Court, Mr. Justice Harlan said in part:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms . . ." *Id.* at 307.[18]

Conceding the government's desire to know, we reject the contention it has a right to know everything. There might well be a "high degree of usefulness" in having every citizen keep a log of his comings and goings, or requiring every citizen to carry a radio transmitter fixing his location. While both requirements would assist in the apprehension of criminals, they would offend even the least sophisticated notions of freedom and privacy.

Finally, the objectives of the Bank Secrecy Act could be met by any number of alternate means. These might include a requirement that individuals retain certain bank records; that recordkeeping be limited to certain defined types of accounts; or that it be limited to certain defined trans-

18. Accord: *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); and *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

actions. There are numerous alternatives to the gluttonous surveillance of all 200 million American bank accounts. Even assuming the government's interest is legitimate and substantial, it "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960)

4. The Bank Secrecy Act's Recordkeeping Requirements Impose an Unreasonable Burden, in Violation of the Fifth Amendment Right of Due Process.

The burden imposed on banks, among others, by the recordkeeping requirements of the Bank Secrecy Act is unreasonable for at least two separate reasons.

Limitations on Recordkeeping—First, the Act violates the limitations this Court has imposed on compulsory recordkeeping.

Congress may, of course, require private citizens and business entities to keep records and make reports. See, e.g., *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950). But that authority has always been limited by the provisio that the records and reports bear some reasonable relationship to the matter under inquiry. *Id.* at 652. Here, as we have said, the relationship between the objectives of the Act and the wholesale surveillance of every bank account in the United States is, at best, tenuous. This disparity, alone, is unreasonable.

Second, there is the requirement that the records be reasonably related to a specific purpose. See, e.g., *United States v. Morton Salt Co.,* 338 U.S. 632, 651 (1950); *Shapiro v. United States,* 335 U.S. 1, 32 (1948); *Yakus v. United States,* 321 U.S. 414, 424 (1944); and *United States v. Darby,* 312 U.S. 100, 125 (1941). In the *Morton Salt* case, for example, the required recordkeeping was in aid of a cease and desist order issued by the Federal Trade

Commission. In the *Shapiro* and *Yakus* cases, the required records were essential to the enforcement of a wartime price control act. The recordkeeping approved in *U.S. v. Darby, supra,* was required in the enforcement of a Federal wages and hours law, and in language common in these cases, the Court said that since Congress could prescribe certain wages and hours, "it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records . . . is an appropriate means to the legitimate end." *Id.* at 125. In this case, the recordkeeping required by the Bank Secrecy Act has no specific purpose other than the accumulation of data "having a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." It does not aid in the enforcement or supervision of any particular legislation and is the means to no apparent end.

Third, this Court—and indeed Congress—has until now consistently confined compulsory recordkeeping to that required to monitor either (1) the recordkeeper, or (2) the recordkeeper's business. Legislation requiring gamblers to record income or employees to record wages and hours, for example, is aimed primarily at the recordkeeper. See, e.g., and respectively, *Marchetti v. United States,* 390 U.S. 39 (1968) and *United States v. Darby,* 312 U.S. 100 (1941). Legislation requiring firearms dealers or drug manufacturers to maintain sales records is designed to monitor the marketing of their respective wares. See, e.g., and respectively, 18 U.S.C. § 923(g) and 21 U.S.C. § 827(b). The latter are directed at both the recordkeeper and the buyer. See generally, *United States v. Miller,* 426 F.2d 794 (4th Cir. 1970). Here, the recordkeeping required by the Bank Secrecy Act has *nothing* to do with the regulation of banks or other financial institutions. America's banks are regulated, among other provisions, by the Federal Reserve Act and

the Federal Deposit Insurance Act.[19] There is no suggestion in the Act's legislative history, and there can be no suggestion in this litigation, that the Bank Secrecy Act is required or even involved in the regulation of America's financial industry. The Bank Secrecy Act is aimed instead at that industry's customers.

Fourth, and finally, the three qualifications on the use of required records in a criminal action against the recordkeeper set forth in *Shapiro v. United States,* 335 U.S. 1 (1948); *Marchetti v. United States,* 390 U.S. 39 (1968); and *Grosso v. United States,* 390 U.S. 62 (1968) would seem especially applicable here.

It is said, first, that records must be ones that the defendant would "customarily" keep. Second, they must have some specific "public aspect"; and third, they must have arisen out of an "essentially non-criminal and regulatory area of inquiry." *Marchetti v. United States,* 390 U.S. 39, 57 (1973)[20] In other words, the government cannot use required records against the recordkeeper in a criminal prosecution unless they would (1) ordinarily be kept in any event; (2) serve some specific public as opposed to private, purpose; and (3) arise in a civil context. The foregoing limitations are designed, of course, to protect the defendant from compulsory self-incrimination. But that protection is destroyed when, as in the case of the Bank Secrecy Act, the recordkeeping obligation is shifted to a third-party, namely banks or other financial institutions, where the privilege against self-incrimination would not apply. See *Couch v. United States,* 409 U.S. 322, 334-335 (1973). Con-

19. See, Federal Reserve Act, Act of December 23, 1913, ch.6, 38 Stat. 251, (12 U.S.C. § 221, *et seq.*); and see Federal Deposit Insurance Act, Act of September 21, 1950, ch. 967, 64 Stat. 873, (12 U.S.C. § 1811, *et seq.*).

20. See, McKay, *Self-Incrimination and the New Privacy,* 1967 Sup. Ct. Rev. 193, 214-217; and Note, *Required Information and the Privilege Against Self-Incrimination,* 65 Colum. L. Rev. 681 (1965).

versely, if the foregoing limitations *are* deemed applicable to a third-party recordkeeper (e.g., banks), then the records required by the Act violate this Court's "required records" doctrine. They are *not* "customarily" kept by banks;[21] they have an all-purpose, rather than specific "public aspect"; and, at best, arise out of *both* a criminal and civil context.

In summary, the Bank Secrecy Act circumvents the limitations this Court has imposed on required recordkeeping. As a result, banks among others are having to keep records for no specific purpose other than the indiscriminate surveillance of the American public. That surveillance, in turn, undermines the limitations on the use of required records in a criminal action against the recordkeeper.

Costs—Quite apart from circumventing limits on compulsory recordkeeping, the Bank Secrecy Act imposes an onerous and unreasonable financial burden—unreasonable because it has no specifice purpose, and onerous because it is costing the recordkeepers a lot of money.

That latter fact is not in dispute.

An uncontested affidavit filed in the District Court establishes that in the first year alone, the Act's recordkeeping requirements cost the Bank of America $392,631.84. (App. 25) Since the Bank of America appears to hold roughly 6.4% of the sums on deposit in America's banks,[22] we may fairly assume that compliance with the Bank Secrecy Act's recordkeeping requirements is currently costing the American banking industry approximately $6.1 million

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21. See discussion, *infra*, at 29.

22. The Federal Deposit Insurance Corporation reports that as of June 30, 1972, there was $553,516,000,000 on deposit in America's banks. (Federal Deposit Insurance Corporation, Summary of Accounts and Deposits In All Commercial Banks—June 30, 1972 (National Summary), 12 (1972)). As of December 31, 1972, the Bank of America held deposits of $35,428,165,000, or approximately 6.4% of the total. (See, American Banker, February 13, 1973, at 105, col. 1.)

a year. The foregoing does not include the additional cost to savings and loan associations, brokers or dealers in securities and other financial institutions. The plain fact is simply this: America's banks, among others, are being forced to spend in excess of $6.1 million a year to spy on their customers.

The government has suggested that most of the records required by the Act are copied and retained in any event.[23] In fact, the Treasury Secretary has admitted that the Act requires "[i]ncreased recordkeeping on the part of banks and other financial institutions of both domestic and foreign related items."[24] In addition, and in the cases now before this Court, the uncontested fact is that but for the Bank Secrecy Act, the Bank of America, for example, would *not* be required to keep "a record of the taxpaper identification number or a record of the Social Security number of its depositors"; would *not* be required to retain copies of "each check, clear draft or money order drawn on the bank;" and would *not* be required to copy the front and back of each check cleared by the bank. (App. 48). Finally, one of the main reasons the Department of Justice proposed and promoted the Bank Secrecy Act was to obtain records not otherwise available.[25]

5. The Bank Secrecy Act's Recordkeeping Requirements Undermine the Safeguards Against Unlawful, Unreasonable and Indiscriminate Use of the Government's Summons and Subpoena Power.

The adverse effect of the Bank Secrecy Act's record-keeping requirements on Fourth and Fifth Amendment

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23. *Motion to Affirm*, filed by the government in Nos. 72-985 and 72-1196, at p.8, n.7.

24. Annual Report of the Secretary of the Treasury on the State of the Finances, 287 (1972).

25. *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess., 58 (1970).

rights may well be illustrated in a number of ways. But nowhere is the damage more apparent than that to the safeguards against improper use of the government's summons and subpoena power.

Consider, for example, the use and enforcement of administrative summonses issued by the Internal Revenue Service.[26] If the summons is directed to the taxpaper and he refuses to comply, certain standards must be met before the District Court can order enforcement. Writing for the majority in *United States v. Powell,* 379 U.S. 48 (1964), Mr. Justice Harlan ruled that while the Commissioner of Internal Revenue need not show probable cause, he must demonstrate

> "that the investigation will be conducted pursuant to a legitimate purpose that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.[27]

In the case of an IRS summons directed to a third party, a different issue has emerged, namely, whether and when the taxpayer may intervene. In *Reisman v. Caplin,* 375 U.S. 440 (1964) the Court appeared to hold that the taxpaper could, without more, intervene and challenge the summons on any appropriate ground. *Id.* at 449.

The *Reisman* ruling apparently hampered IRS tax investigation,[28] and in *Donaldson v. United States,* 400 U.S. 517

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26. See Act of August 16, 1964, c. 736, 68A Stat. 901 (26 U.S.C. § 7602).

27. The *Powell* case involved a summons directed to the president of a corporate taxpayer, and in a companion case involving an individual taxpayer, this Court set forth the same enforcement standards. See *Ryan v. United States,* 379 U.S. 61 (1964).

28. Ord, *The IRS's Right of Access to the CPA's Workpapers and Client Records,* The Tax Advisor 516, 517 (September 1973). The author was formerly Assistant U.S. Attorney for the Northern District of California, Civil Tax Litigation and Criminal Tax Prosecutions; and a trial attorney in the Tax Division of the Department of Justice. *Id.* at 516.

(1970) the taxpayers right to intervene was limited. In *Donaldson*, the IRS directed a summons to the taxpayer's accountant and former employer. The summons called for various writings and documents pertaining to the taxpayer but owned by the respondents. The IRS initiated enforcement proceedings, and the taxpayer attempted to intervene. This Court denied intervention, and said the taxpayer did not have a "significantly protectable interest." *Id.* at 531. The latter appears to include actual or constructive possession of the records in question; an attorney's or accountant's work product; or an "established attorney-client or other privilege." *Id.* at 530. In addition, *Reisman* suggests, supported by dicta in *Donaldson*, that a taxpayer has a right to intervene if the IRS has recommended criminal prosecution prior to issuance of the summons. See *Reisman v. Caplan, supra,* and see *Donaldson v. United States, supra* at 536.

Finally, in 1973, this Court came to consider whether an IRS summons, directing a third-party accountant to produce papers given him by a taxpayer, could be enforced over the taxpayer's assertion of the privilege against self-incrimination. In *Couch v. United States,* 409 U.S. 322 (1973), the Court held that since the Fifth Amendment prohibition against compulsory self-incrimination was personal in nature, and since the taxpayer had surrendered possession of the papers in question, his ownership was irrelevant and the IRS summons would be enforced. Here again, however, the Court set forth two qualifications. First, the Court recognized that there may be situations "where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Id.* at 333. In the foregoing situation, the privilege against self-incrimination could well be applicable. *Id.* Sec-

ond, the Court suggested that when a taxpayer delivers records to a third party with a legitimate "expectation of protected privacy or confidentiality," he may be in a position to assert Fourth and Fifth Amendment protection. *Id.* at 335-336.

Together, *Powell, Reisman, Donaldson* and *Couch* would seem to set forth the standards and exceptions applicable to enforcement of an IRS summons. The recordkeeping requirements of the Bank Secrecy Act however, undermine those standards and eliminate whatever opportunity a taxpayer might have to contest disclosure. By compelling banks, among others, to copy a taxpayer's checks, deposit slips, and etc., the Act effectively transfers title and possession from the taxpayer to the bank without regard to the parties' intentions, plans or purpose. Copies made by a bank belong to that bank. For all practical purposes the copies are the equivalent of the originals. As such, the Act's compulsory recordkeeping requirements convert virtually every piece of paper that passes through the American banking system into the personal and possessory property of the banks. The Act abrogates banks' historical and customary role as temporary custodians of their customers' written orders and instructions, and instead gives them title and possession to a glut of documents they do not need or want.

As a result of this compulsory change in ownership and possession, the IRS, for example, will seldom find it necessary to direct a summons to a taxpayer under investigation. The taxpayer's bank and the other financial institutions with whom he deals will, by reason of the Bank Secrecy Act, have in their possession a detailed chronicle of the taxpayer's financial affairs. More importantly, the taxpayer's opportunity and ability to resist disclosure will, for all practical purposes, be destroyed. Assuming he

learns of the summons—by no means certain[29]—his ability to challenge disclosure would depend, first, on his right to intervene, that is, whether he has a "significantly protectable interest." *Donaldson v. United States, supra,* at 531. As we have noted above, the latter is said to include actual or constructive possession, an attorney or accountant work product, or an evidentiary privilege. *Id.* at 530. Yet *none* of the foregoing applies to copies made and retained by banks in accord with the Bank Secrecy Act.

Nor could the taxpayer claim an "expectation of protected privacy or confidentiality." *Couch v. United States, supra,* at 335-336. The Act's *mandatory* copying requirements preclude any "expectation of protected privacy." Privacy and confidentiality are inconsistent with a statute that compels banks and other financial institutions to make and retain copies of their customers' papers for the use of the government "in criminal, tax or regulatory investigations or proceedings."

Intervention by the taxpayer, then, would appear to depend on the IRS having recommended criminal prosecution. See *Reisman v. Caplin, supra,* and see *Donaldson v. United States, supra,* at 536. But assuming criminal action had been recommended and the taxpayer allowed to intervene, what constitutional rights could he assert? The Bank Secrecy Act's mandatory copying requirements give the financial institutions with whom the taxpayer deals title to

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29. A recent study conducted by the American Civil Liberties Union shows that while the majority of the nation's largest banks support the confidentiality of bank records, this policy may not be enforced on a day-to-day basis at the local level.

> "[M]any banks voluntarily allow agents of the government—police, FBI agents, investigators for Congressional committees—to examine at will the records of individual and organizational accounts, without the permission or indeed the knowledge of any of the people involved." American Banker, May 19, 1972, p.1, cols. 3-4.

and possession of his records. As such, he could not assert the Fifth Amendment privilege against compulsory self-incrimination. *Couch v. United States,* 409 U.S. 322, 334-335 (1973); *Johnson v. United States,* 228 U.S. 457 (1913). Nor could he assert Fourth Amendment protection from unreasonable search and seizure. Having recommended criminal prosecution for income tax evasion, as an example, the government would clearly have probable cause for a summons directed to the taxpayer's bank. See *United States v. Powell,* 379 U.S. 48, 57 (1964); and see also *First National Bank v. United States,* 295 F. 142 (S.D. Ala. 1924) *aff'd per curiam,* 267 U.S. 576 (1925).

In summary, the safeguards established by this Court to prevent illegal and improper use of the government's summons and subpoena power have been virtually destroyed by the Bank Secrecy Act. By undermining *Powell, Donaldson,* and *Couch,* the Act impairs the balance this Court has established between the government's need to know and the citizenry's right to financial privacy. Quite apart from the gross overreaching inherent in the surveillance of every bank account in the United States, the Bank Secrecy Act eliminates effective challenge to an IRS third-party summons.

6. The Bank Secrecy Act's Recordkeeping Requirements Violate the First Amendment Rights of Privacy and Anonymity.

The relationship between a bank and its customers has been variously described as that of debtor and creditor[30] or agent and principal.[31] Most of the cases use language similar to that in an old New York case, *Crawford v. West Side Bank,* 100 N.Y. 50, 2 N.E. 881 (1885):

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30. 9 C.J.S. *Banks and Banking* § 267(c), 546.

31. *Crawford v. West Side Bank,* 100 N.Y. 50, 2 N.E. 881 (1885); *Dalmatinsko, etc. v. First Union Trust and Savings Bank,* 268 Ill. App. 314 (1932); *Bernhard v. Bank of America, N.T. & S.A.,* 19 C.2d 807, 122 P.2d 892 (1942).

> "The relation existing between a bank and its depositors is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor the bank must do so subject to the rules obtaining between principal and agent." *Id.*

Both definitions recognize that the relationship is contractual, and that among the elements of that contract, none is more important than the banks' express and implied assurance of privacy. This assurance of privacy has been consistently recognized by the American courts. See *Zimmermann v. Wilson,* 81 F.2d 847 (3d Cir. 1936); *United States v. First Nat. Bank of Mobile,* 67 F. Supp. 616 (S.D. Ala. 1946) *Peterson v. Idaho First Nat. Bank,* 83 Ida. 578, 367 P.2d 284 (1961). In the *Peterson* case, for example, the court said:

> "It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors . . . . It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract." *Peterson v. Idaho First Nat. Bank, supra,* at 290.[32]

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32. "Secrecy has been a basic tenet of banking ever since its establishment. Specific rules date back to the seventeenth century; and with rare exception bank secrecy has never been totally banned in any country. It has survived both commercial and political crises; only in wartime or under dictatorships has it been abused or abolished." Schuster and Lehner, *Why Swiss Bank Secrecy,* 156 The Bankers Magazine 32 (Autumn, 1973). The authors are officers of the Institut fur Bankwirtschaft in St. Gallen, Switzerland.

By reason of this assurance of privacy, the American public has come to regard confidentiality in bank-customer relations as an aspect of their personal privacy.

The First Amendment protects personal privacy. See, e.g., *Katz v. United States,* 389 U.S. 347 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1965); and *Rios v. United States,* 364 U.S. 253 (1960). And in the case of the First Amendment, this Court has been especially sensitive to improper government intrusion. For example, statutes and ordinances requiring permits from local officials as a prerequisite to the use of public places have been held invalid in the absence of narrowly drawn, reasonable and definite standards. *Niemotko v. State of Maryland,* 340 U.S. 268, 271 (1951).

Here, the Act authorizes and allows the Treasury Secretary to find that any and all bank records originating with a bank or its customers have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101, 123). The Secretary has seized on the foregoing provisions and declared that virtually *every* piece of paper that passes through America's domestic banking system has "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (31 C.F.R. §§ 103.31, 103.34).

The Act is too broad. It provides no definite standards. If "high degree of usefulness in criminal, tax or regulatory investigations or proceedings" is an acceptable standard, what is to prevent the Congress from declaring that all telephone conversations, retail purchases, and letters sent and received "a high degree of usefulness" in criminal investigations?

Quite apart from its vague, ill-defined standards for inclusion, the Act's recordkeeping requirements impair pri-

vacy by allowing the Treasury Secretary virtually unlimited discretion in granting exemptions from those requirements. (Section 101(c). This absence of standards for inclusion or exclusion gives the Treasury Secretary free rein to intrude on the First Amendment. The Secretary can include and exclude individual banks, bank accounts and customers at will. Political and financial abuse is possible. Intrusion on the First Amendment is near certain.

Finally, the Act's recordkeeping requirements impair a corollary to the First Amendment right of free expression —the right to remain anonymous. Those engaged in the dissemination of ideas need not be publicly identified. *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960); *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462 (1958). It is said that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley v. State of California,* 362 U.S. 60, 65 (1960). The copying and retention of every check made by every bank customer cannot help but impair the free exercise of such First Amendment rights as political association, personal expression and religious affiliation. Anonymous donations may well be essential to the survival of public-interest or controversial organizations. (App. 33-34). Anonymity surely disappears when, at the direction of the government, an intermediary is required to monitor, record and retain the act of affiliation or expression.

7. Since the Bank Secrecy Act's Recordkeeping and Domestic Reporting Requirements Are Inexorably Tied, They Are Unconstitutional for the Same Reasons.

The Bank Secrecy Act's recordkeeping requirements are the handmaiden of the Act's domestic reporting provisions. The bank records required by the Act supplement the

compulsory reports called for under Title II. Section 121(b), for example, provides:

> "It is the purpose of this chapter *to require the maintenance of appropriate types of records and the making of appropriate reports* . . . where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." (Emphasis added).

The government appears to concede that the recordkeeping and reporting provisions are mutually dependent. The government has said that the District Court's order enjoining enforcement of the Act's reporting provisions "creates a serious gap in the Bank Secrecy Act."[33] This "serious gap" is then explained:

> "These currency transaction *reporting provisions* are necessary to carry out the central objective of the Bank Secrecy Act: to disclose transactions entered into for the purpose of concealing illegal sources of funds or preventing protection of their use in unlawful enterprises. To this end, Title I of the Act is aimed at requiring banks to *maintain records* sufficient to provide the evidence necessary for criminal, tax and regulatory investigations and proceedings, and adequate to make certain that the identity of bank customers is accurately established." (Emphasis added).[34]

For the reasons given by the District Court (App. 79-92), and for the reasons to be set forth by the CBA in reply to the government's appeal, the Act's domestic reporting requirements are unconstitutional. As the handmaiden of

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33. *Jurisdictional Statement*, filed by the government in Nos. 72-985 and 72-1196, page 9.

34. *Id.* at 17.

those provisions, the Act's recordkeeping requirements are invalid for the same reasons.

8. The California Bankers Association Has Standing to Assert the Constitutional Rights of Its Members and Their Customers.

The government has argued that the California Bankers Association has no standing to assert the constitutional rights of its members' customers.[35] The government's argument would appear to ignore applicable law.

First, "an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). The critical question is said to be whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. . ." *Baker v. Carr,* 369 U.S. 186, 204 (1962). Here, the injury to the member banks of the California Bankers Association is evident and substantial. The Bank Secrecy Act asks banks to record and retain—at substantial cost—the details of their customers' financial, social and political lives in apparent violation of their's and their customers' rights under the First and Fifth Amendments.[36]

Second, it seems clear that the CBA has standing to assert the constitutional rights of its members' customers. Beginning at least with *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), this Court has upheld the right of representative litigants to assert the constitutional rights of those they represent. In the *Society of Sisters* case the Court found a statute unconstitutional because it ". . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of chil-

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35. See, e.g., *Motion to Affirm,* filed by the government in Nos. 72-985 and 72-1196, pages 9 and 23.

36. See discussion, *supra,* at 23-38.

dren under their control." *Id.* at 534-535. The plaintiff in the case was a private parochial school, and neither the parents, guardians nor children subject to the statute were parties to the litigation. Here, as in the *Society of Sisters* case, the banks ask "protection against arbitrary, unreasonable and unlawful interference with their patrons." *Id.* at 536.

The *Society of Sisters* case was analyzed and approved in *Barrows v. Jackson,* 346 U.S. 249 (1953), the Court noting:

> ". . .[W]e believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect fundamental rights which would be denied by permitting the damages action to be maintained." *Id.* at 257.[37]

More recently, in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Court upheld the standing of a contraceptive distributor to assert the rights of unmarried persons denied access to birth control devices. The Court noted that since the statute in question did not subject unmarried persons to prosecution, "to that extent [they] are denied a forum in which to assert their own rights." *Id.* at 446. Similarly, and in the case now before this Court, the banks' customers are not subject to prosecution. The Act's recordkeeping burden and criminal sanctions fall on banks and other financial institutions. (Sections 101(d) and 123(a) 126, 127). Their customers are not subject to prosecution. Yet it is their customers whose rights of due process and privacy are being violated.

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37. See generally, Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962). Professor Sedler's analysis was cited with approval in *Eisenstadt v. Baird,* 405 U.S. 438, 445 (1972).

CONCLUSION

For the reasons stated, it is respectfully submitted that that the order of the District Court denying the motion of the California Bankers Association for a preliminary injunction, restraining the enforcement and operation of Title I and implementing regulations of the Bank Secrecy Act, should be reversed.

November 16, 1973

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(Appendices Follow)

Appendix A

The Constitution of the United States of America

Amendments

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114

TITLE I—FINANCIAL RECORDKEEPING

Chapter 1.
Insured Banks and Insured Institutions

§ 101. Retention of Records by Insured Banks—Congressional Findings and Declaration of Purpose

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness

in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank

shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

§ 102. Retention of Records by Insured Institution

The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in Section 21 of the Federal Deposit Insurance Act with respect to insured banks."

Chapter 2.
Other Financial Institutions

§ 121. Congressional Findings and Declaration of Purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 122. Reports on Ownership and Control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

§ 123. Recordkeeping and Procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degre of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) any records or evidence of any type which the Secretary is authorized under section 21b of the Federal

Deposit Insurance Act to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

§ 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or

temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

§ 125. Civil Penalties

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 126. Criminal Penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 127. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any regulation under this chapter, section 21b of the Federal Deposit Insurance Act, or section 411 of the National Housing Act where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

§ 129. Administrative Procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 21b of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS

Chapter 1.
General Provisions

§ 201. Short Title

This title may be cited as the "Currency and Foreign Transactions Reporting Act".

§ 202. Congressional Declaration of Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and Rules of Construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;
(14) a dealer in precious metals, stones, or jewels;
(15) a pawnbroker;
(16) a loan or finance company;
(17) a travel agency;
(18) a licensed transmitter of funds;
(19) a telegraph company;
(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or
(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

(k) For the purposes of section 1001 of Title 18, United States Code, the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

§ 204. Regulations

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

§ 205. Compliance

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

§ 206. Exemptions

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

§ 207. Civil Penalty

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United

States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

§ 209. Criminal Penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

§ 210. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

§ 211. Immunity of Witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 212. Availability of Information to Other Federal Agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may be regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

§ 213. Administrative Procedure

Subject to section 203(j) the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 4, United States Code, shall apply to all proceedings under this title.

Chapter 2.
Domestic Currency Transactions

§ 221. Reports

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require

if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons Required to File Reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting Procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution,

except that (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Chapter 3.
Reports of Exports and Imports of Monetary Instruments

§ 231. Reports—Persons Required to File

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the follow-

ing information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

§ 232. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 231(i) either has not been filed or contains material omissions or mistatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until

the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

§ 233. Civil Liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 232.

§ 234. Remission of Forfeiture or Penalty

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

§ 235. Enforcement Authority

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 231 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Chapter 4.
Foreign Transactions

§ 241. Records and Reports Required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

§242. Classifications and Requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

Appendix C

31 C.F.R. § 103.

Note—After this litigation began and the District Court had rendered its opinion, the Secretary of the Treasury amended various sections of the Bank Secrecy Act regulations. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). For the convenience of the Court and counsel, we have set forth the amended regulations immediately following each of the sections to which the amendments apply. Additions to the original regulations are set in italics. Deletions are indicated by a line through the deleted word or words.

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 Meaning of Terms

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that

title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 103.11 Meaning of Terms [As Amended]

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank *(except bank credit card systems);*

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

~~(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;~~

(5) ~~(6)~~ a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type or commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 Determination by the Secretary

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of Currency Transactions

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Report of Transportation of Currency or Monetary Instruments

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures

or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instru-

ments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 Reports of Foreign Financial Accounts

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 Filing of Reports

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 Identification Required

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 Determination by the Secretary

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the

type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be Made and Retained by Financial Institutions

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 Additional Records to be Made and Retained by Banks

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer,

comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one ocasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.34 Additional Records to be Made and Retained by Banks [As Amended]

(a)(1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall *within forty-five days from the date such an account is opened,* secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. *In the event that a bank has been unable to secure the identification required herein with respect to an account within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if (i) it has made a reasonable effort to secure such identification, (ii) it maintains a list containing the names, addresses and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses and account numbers of those persons available to the Secretary as directed by him.*

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS-4 or SS-5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and in-

strumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (a) ambassadors, ministers, career diplomatic or consular officers, or (b) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions and immunities as an international organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10, and (viii) Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a)(3)(vii) and (viii) of this section, the bank shall, within fifteen days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpayer identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under Section 6109 of the Internal Revenue

Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn *for $100 or less or those drawn* on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item *in excess of $100* (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, invest-

ment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, ~~or investment securities,~~ and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check *in excess of $100* deposited in such account through its domestic processing system or to supply a description of a deposited check *in excess of $100*. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 Additional Records to Be made and Retained by Brokers and Dealers in Securities

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification

number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

§ 103.35 Additional Records to be Made and Retained by Brokers and Dealers in Securities [As Amended]

3. Subpart C is further amended by amending § 103.35 by deleting "paragraph (1)" in paragraph (a)(2), and substituting therefore the words "paragraph (a)(1) of this section"; and by deleting "subsection (1)" in paragraph (a)(3), and substituting therefor the words "paragraph (a)(1) of this section."

§ 103.36 Nature of Records and Retention Period

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person Outside the United States

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person

making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 Dollars as Including Foreign Currency

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or Other Reproductions of Government Obligations

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of Information

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired,

the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

§ 103.43 Availability of Information [As Amended]

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor. *Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.*

§ 103.44 Disclosure

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 Exceptions, Exemptions, ~~Modifications,~~ and Reports

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, ~~impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify,~~ the requirements of this part. Such exceptions, exemptions, ~~requirements or modifications~~ may be conditional or unconditional, may apply to particular persons or to classes

of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.45 Exceptions, Exemptions, Modifications, and Reports [As Amended]

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, *or* grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, *or* exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 Enforcement

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 Civil Penalty

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any

material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 Forfeiture of Currency or Monetary Instruments

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 Criminal Penalty

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 Enforcement Authority with respect to Transportation of Currency or Monetary Instruments

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 Effective Date

This part shall become effective July 1, 1972.

§ 103.51 Access to records [As Amended]

~~**This part shall become effective July 1, 1972.**~~

Except as provided in §§ 103.34(a)(1) and 103.35(a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law.